Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

ROBERT E. STOOKSBURY, ET AL.,
Petitioners,

v.

ROHM & HAAS COMPANY,
Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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The thirty-five petitioners sued Rohm and Haas Company for age discrimination in hiring under a pattern-or-practice theory. All individual claims were dismissed on summary judgment even though the district court did not address the pattern-or-practice method of proof, and appellate judges stated it was a "tough case" and urged the parties to attempt settlement. (App. at 42a).

QUESTIONS PRESENTED FOR REVIEW

A. Under a pattern-or-practice theory of discrimination, may a court dismiss a plaintiff's individual claim on summary judgment without considering the pattern-or-practice framework?

1. To properly raise the pattern-or-practice theory, is there a heightened notice prerequisite that requires plaintiffs at the summary judgment stage to file a "trial plan" and notify the court and the defendant of a proposed bifurcated trial, although no such requirements exist in the applicable court rules or scheduling orders?

2. Did the plaintiffs present evidence sufficient to raise a genuine issue of material fact as to whether Rohm and Haas engaged in a pattern-or-practice of age discrimination in hiring?

B. Is the *McDonnell Douglas* framework relevant, or are any elements of that analysis relevant at the summary judgment stage of a pattern-or-practice case? If so, did the Sixth Circuit improperly exclude relevant circumstantial evidence of discrimination by its rule that "pretext may not be shown by attacking the adverse employment decision itself," and the "soundness of an employment decision may not be challenged as a means of showing pretext?"

1. To the extent the *McDonnell Douglas* framework is relevant at the summary judgment stage of this case, did the lower courts fail to properly evaluate evidence unique to each individual age discrimination claim, such that one or more plaintiffs is entitled to have a jury decide whether age was a factor in Rohm and Haas' decision not to hire them?

LIST OF PARTIES

Petitioners

The petitioners are Robert E. Stooksbury, George Liford, Gerald Hodge, Earl Kitts, Paul Buckner, Jerry Devault, Jimmie Henderson, Gary White, Ronnie Neubert, Sam Mills, Jr., Phillip Branson, Alice Laverne Hall, Ronald V. Browning, Jack Dixon, Charles U. Shelton, Hubert L. Cason, Thomas E. Strickland, Ray Fee, William D. McConkey, James H. Hill, Chris Connatser, Fate Nix, Allen A. Cloninger, Eddie Vananda, Marion B. Cooper, Sammy L. Dyer, Elizabeth C. Bowling, John Lawson, Ralph E. Justus, Billy Mccoy, Theresa D. Rogers, Paul Mclain, Jerry Hillard, John Chumlea, and Carl E. Shular.

Respondent

The respondent is Rohm & Haas Company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on May 28, 2003. Petitioners pray for an order granting certiorari, vacating the judgment, and remanding the case to the lower court for a jury trial using the pattern-or-practice method of proof.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is set forth in the Appendix at 3a-10a and is unreported. The decision of the United States District Court for the Eastern District of Tennessee is set forth in the Appendix at 11a-33a and is unreported.[1]

JURISDICTIONAL STATEMENT

On May 28, 2003, the United States Court of Appeals for the Sixth Circuit issued its decision affirming the summary judgment entered by the district court. A petition for rehearing en banc was denied on July 23, 2003. (App. at 1a-2a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

This case arises under the Age Discrimination in Employment Act of 1967 [ADEA], 29 U.S.C. §621 et seq., which states in pertinent part: "It shall be unlawful for an employer -- (1) to fail or refuse to hire . . . or otherwise

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[1] Citations to "App." are to the appendix filed with this Petition for a Writ of Certiorari pursuant to Supreme Court Rule 14(i).

Citations to "J.A." are to the joint appendix filed in the Sixth Circuit Court of Appeals.

discriminate against any individual . . . because of such individual's age;"

STATEMENT OF THE CASE

The district court had jurisdiction over the original action pursuant to 28 U.S.C. §1331 because the case presented a federal question arising under the ADEA.

NOTICE OF THE PATTERN-OR-PRACTICE THEORY

The thirty-five petitioners asserted in their Complaints that Rohm and Haas engaged in a pattern-or-practice of age discrimination when it refused to consider them for available jobs. (J.A., pp. 31, 37, 47). Rohm and Haas moved for summary judgment, stating that it did not hire the plaintiffs because they were not qualified, or because some had not timely applied, or because they had not applied for the correct position. In addition to responding to these issues raised in the defendant's motion for summary judgment, the plaintiffs fully articulated the law relevant to the pattern-or-practice framework and argued that their case be analyzed under this framework. (J.A., pp.1529-1604). Moreover, the plaintiffs filed a supplemental brief to clarify the framework for evaluating a pattern-or-practice case at the summary judgment stage. (J.A., pp. 3363-64, 3367-77). In their supplemental brief to the district court, the plaintiffs quoted the relevant portions of *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1109 (10th Cir. 2001), wherein the Tenth Circuit holds that the individualized analysis under *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), is not appropriate at the initial summary judgment stage of a pattern-or-practice case because the plaintiffs are entitled to a presumption of discrimination upon a favorable resolution of the pattern-or-practice issue; thus, the pattern-or-practice

issue must be resolved, or the presumption taken into account when individual claims are evaluated. Nevertheless, on September 7, 2001, the district court granted summary judgment for Rohm and Haas dismissing all thirty-six individual claims, with no attempt to address the pattern-or-practice framework or the interaction of that theory with the *McDonnell Douglas* analysis at the summary judgment stage.

The Sixth Circuit affirmed the district court's summary disposition of all thirty-six individual claims holding that the plaintiffs failed to properly raise the pattern-or-practice issue. The Sixth Circuit adopts a heightened notice prerequisite by holding that the plaintiffs should have filed a "trial plan" to inform the court "that they were proceeding only under a pattern-or-practice framework" and "that they were proposing a bifurcated proceeding" under this theory. (App. at 5a). The plaintiffs complied with all Federal Rules of Civil Procedure, local rules and court orders. Moreover, the plaintiffs had in fact served Rohm and Haas with a first draft of a Pretrial Order, wherein they proposed a trial plan utilizing the pattern-or-practice framework. (App. at 37a). The draft Pretrial Order was a work in progress and not yet due to be filed with the district court under it's Scheduling Order.[2]

The plaintiffs adequately notified Rohm and Haas and the district court of their pattern-or-practice theory in their complaints; they set forth the relevant law, including the

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[2] Under the district court's Scheduling Order in this case, the parties were to prepare a Pretrial Order (essentially a "trial plan"), which is filed with the district court 30 days before trial. The plaintiffs served the first draft of the proposed Pretrial Order on the defendant on April 4, 2001. The trial date was not until January 28, 2002. (App. at 41a).

bifurcated nature of proceedings in their response to the defendant's motion for summary judgment, and they argued to the district court in that brief that it should apply the pattern-or-practice analysis to the facts of this case; they filed a supplemental brief to call the court's attention to the Tenth Circuit decision holding that the *McDonnell Douglas* individualized analysis should not be utilized at the summary judgment stage; and they timely notified Rohm and Haas of their proposed "trial plan" using the pattern-or-practice framework.[3] Both the defendant and the district court explicitly acknowledge having notice of the plaintiffs' intent to pursue the pattern-or-practice theory.[4] At the time the plaintiffs filed their initial response to the defendant's motion for summary judgment, the law was not clear as to whether the *McDonnell Douglas* analysis was relevant or how it interacts, if at all, with the pattern-or-practice method of proof at the summary judgment stage. The plaintiffs responded to the defendant's arguments under *McDonnell Douglas*, but nevertheless properly raised the pattern-or-

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[3] Even if the district court perceived the plaintiffs' response brief as merely setting forth an "additional" method of proof as opined by the Sixth Circuit, the plaintiffs' supplemental brief notified the district court and the defendant that *McDonnell Douglas* was not the appropriate framework for analyzing the case on summary judgment. (App., 6a). Rohm and Haas did not respond to this issue in the plaintiffs' supplemental brief even though it responded to other issues from that brief. The plaintiffs did not discuss the disparate impact theory. (J.A., pp. 1599-1601).

[4] The defendant's summary judgment brief states that there is no need to address the pattern-or-practice theory; however, it discusses that theory in its reply brief. (J.A., pp. 1599, 2937). The district court decision states "the plaintiffs contend that the defendant has engaged in a pattern and practice of discrimination against older employees." (App., 12a).

practice theory and proceeded timely and in accordance with all the rules of civil procedure and district court orders.

In addition to adopting a new heightened notice prerequisite for pursuing pattern-or-practice discrimination cases, the Sixth Circuit held that the plaintiffs failed to create a genuine issue of material fact as to whether Rohm and Haas engaged in a pattern-or-practice of age discrimination in hiring. The merit of the plaintiffs' circumstantial evidence was acknowledged by appellate judges who urged the parties to attempt settlement. (App., at 42a-43a). Thereafter, the appellate decision dedicates one paragraph to rejecting an intensely factual record (over three thousand pages) in this circumstantial evidence case, with no mention of evidence unique to individual claims. Both lower courts rely on the record from a similar case that does not adequately reflect the evidence in this record.[5]

FACTS SUPPORTING THE PATTERN-OR-PRACTICE THEORY

Between 1988 and 2000, Rohm and Haas filled over two hundred forty-three (243) vacant hourly production jobs at its chemical manufacturing plant in Knoxville, Tennessee. (J.A.,

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[5] The lower courts rely so heavily on *Browning et al., v. Rohm and Haas, Tennessee, Inc.*, that they incorrectly state the name of the defendant in this case as Rohm and Haas Tennessee, Inc. The *Browning* case involved two plaintiffs who pursued different legal theories (contractual and disparate impact, but no pattern-or-practice claim), and who were represented by different counsel in the district court. Although there are some overlapping issues and facts, the lower courts' reliance on the Browning record results in an inaccurate representation of the evidence in this record. This record is so factually intensive it is nearly impossible to include all relevant facts in this Petition; detail is well-documented in the lower court briefs.

pp. 1633, 1925). The time period in which Rohm and Haas engaged in a pattern-or-practice of age discrimination in hiring was between September 1994, when it started hiring new employees, (as opposed to recalling former employees with contractual rehire rights or transferring current employees from its other plants) until the first age discrimination lawsuit was filed against it on December 6, 1996 [the "Browning" lawsuit]. Rohm and Haas implemented new hiring criteria for all *hourly production jobs* at the Knoxville plant in September 1994.[6]

From September 1994 until it was sued, Rohm and Haas hired sixty-three new employees. Of the sixty-three "new hires," six were over forty years old; but of these six, four were under age 45 (ages 41, 43, 43, 44), and thus, substantially younger than many of the petitioners ["plaintiffs"]. The average age of the sixty-three newly hired employees on the date hired was 30.2 years old. The average age of the plaintiffs on December 31, 1995 was 51.5 years. (J.A., pp. 1604A, 2013-23). Before the first age discrimination lawsuit was filed against Rohm and Haas, 87.3% of the new hires were hired under the two educational degree criteria, and only 12.6% qualified under the work

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[6] The new hiring criteria were adopted in November, 1993. The policy stated that it was applicable to hourly production jobs, but would not be implemented until "the current list of former employees with rehire eligibility is exhausted." (J.A., pp. 1764, 363). The hiring requirements are:

- An Associate Degree in Chemical and Environmental Engineering Technology from Pellissippi State (or equivalent degree from another school), or
- Five years of relevant experience in chemical plant operations or
- A relevant four year degree from an accredited college or university.

experience criterion. After Rohm and Haas was sued, it hired 65.6% under the work experience criterion and 34.3% under the two educational criteria. (J.A., pp. 2013-23, 563-64). Applicants in the protected age group were hired primarily under the relevant work experience criterion rather than under the relevant degree criteria. Several applicants in the protected age group with qualifying work experience were rejected by Rohm and Haas upon their first application, but later hired by the company after it was sued. (J.A., pp.1672, 2643, 2646, 2649, 2652, 2662, 2709, 2730; and 2020-21 for ages, [New hire#s: 97-100, 103, 118, 125- page two of applications]). Rohm and Haas considers each criterion to be of equal relevance. (J.A., p. 1672). The average age of the Knoxville plant workforce decreased from age 58 to age 40 since mid 1990s. (J.A., p. 1604D). The age distributions and the immediate changes after a lawsuit was filed are statistically significant. (J.A., pp. 1915-21).

Development of a discriminatory operating procedure began in 1992 when Knoxville plant managers proposed age restrictions to its apprenticeship program, desiring to limit entry to those under 47 years old. (J.A., pp. 1740-42, 1781-82). Age restrictions for those jobs were included for the first time in the collective bargaining agreement ["CBA"] signed on January 22, 1993, which is the same time frame management initiated the process to develop hiring criteria for new employees. (J.A., pp. 1811-12, 1955-56, 1741-43, 393, 395, 1866). Despite notification from the EEOC on May 6, 1996 that age restrictions were no longer legal, the Knoxville plant maintained them in the CBA until at least 1999 because they wanted to use them again if it became legal to do so. (J.A., pp. 441, 445, 1812, 1839). Thus, management subscribed to age-based stereotypical thinking about "older" workers (e.g., workers over 47 years old will not be around as long as younger workers) throughout the time it made

hiring decisions impacting the plaintiffs. Moreover, the age restrictions for apprenticeship jobs are inseparable from hiring decisions for hourly production jobs because applicants must be hired under the new criteria for hourly production workers before bidding to apprenticeship jobs. (J.A., pp. 1649, 1749, 2013-23). In other words, Rohm and Haas needed to hire "younger" workers for its hourly production jobs because these workers comprised the applicant pool for the age restricted apprenticeship jobs.

At this time, the Knoxville plant employed a large number of workers in the protected age group, but most of them were hired in the mid 1960s when they were substantially under age forty. (J.A., pp. 1831-36). As soon as management implemented new age restrictions in January 1993, they began to look into hiring new employees. Managers were concerned about the plant's rapidly retiring workforce, which was the catalyst for them to appoint a subcommittee in February 1993 to investigate recruitment and hiring of hourly production workers. (J.A., pp. 1866, 393, 395).

The available jobs for which Rohm and Haas hired new employees were hourly production jobs; however, Rohm and Haas refers to the available jobs as Chemical Operator jobs throughout the Browning lawsuit and this case. Hourly production jobs include eleven different jobs in six departments; only two of eleven job titles are Chemical Operators. (J.A., pp. 1634-35, 1813, 1839-42, 1652). The various jobs involve skills and duties ranging from the computerized Chemical Operator job to janitorial type work, manual labor, and fork lift driving. (J.A., pp. 1705, 1631, 1892-98, 1658-59).

The hiring criteria developed and implemented by Rohm and Haas to screen for hourly production workers are not relevant to at least seventy percent (70%) of the available jobs

for which it hired new employees.[7] Managers admit that the hiring criteria are not relevant or necessary for many of the hourly production jobs; however, they now assert that they use the criteria because the company permits employees to bid to the Chemical Operator job. (J.A., pp. 1747-49, 1876-78, 1627, 1805). This assertion is undermined by the company's attempt to portray all available jobs as the computerized "Chemical Operator" job in an effort to hide the fact that its hiring criteria are not relevant to the majority of jobs.[8]

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[7] All mechanical jobs, except electrician, are filled by workers hired under the new hiring criteria. (J.A., pp. 1649, 1749). Mechanical jobs constitute about 28% of the total hourly jobs, and include Millwright, Pipefitter, Carpenter, Electrician, Utility Operator, and Maintenance Mechanic. (J.A., pp. 1783-88, 1841). Applicants hired under the new hiring criteria have successfully bid to mechanical jobs shortly after being hired. (J.A., p. 2015 [New hire #s 21, 23]). As of 1997, there were 204 hourly workers at the Knoxville plant, including 57 mechanical and 147 non-mechanical. Only 29% of these jobs were "Chemical Operator" jobs. (J.A., pp. 1810, 1831-36).

[8] Rohm and Haas attempted to portray all available jobs as the computerized Chemical Operator job by invoking a dual meaning for the term "chemical operator." It used this term deceptively; at times, to mean all hourly production jobs, but other times it meant the specific computerized Chemical Operator job. Assistant Personnel Director David Boatman now states that his list of "new hires" relied on in the Browning lawsuit is inaccurate because it implies that all new hires held the job title "Chemical Operator" when many never performed this job. (J.A., pp. 1652, 1709, 1451, 2013-2023, 1901). Likewise, the company's "experts," who assert that the hiring criteria are relevant, do not indicate knowledge about management's use of the hiring criteria to screen for eleven very different hourly production jobs as well as mechanical jobs. (See e.g., J.A., pp.259-61, 407-09). Management's deception was successful in the Browning lawsuit.

The CBA gives Rohm and Haas exclusive control over recruitment and hiring of new employees. (J.A., p. 1814). Managers may, and have, adopted hiring criteria to correspond to different job skills, such as when they adopted separate hiring criteria for electricians in the mid 1990s. (J.A., pp. 1749-50, 1805, 1814, 1636, 1658). When a new line of hourly production work evolved in the mid 1990s, managers had another opportunity to adopt hiring criteria relevant to the new jobs. They decided, however, to use hiring criteria that they admit are not relevant to this work, which involves putting chemicals into drums and moving them about with a fork lift. (J.A., pp. 1747-50, 1631, 1635, 1628, 2018-19, 1894-95, 1732-34).

The hiring criterion requiring five years relevant chemical plant experience is unusual in the industry, even compared to hiring criteria at other Rohm and Haas plants, such as in Louisville, Houston, Bristol, and Philadelphia. These Rohm and Haas plants use the same production processes and products as the Knoxville plant. Plant managers consider work experience at one of these plants to be relevant to the jobs at the other similar plants. The most stringent work experience criterion at any of the similar plants requires only two years of "relevant" production experience. The Louisville, Kentucky plant, which is *identical* to the Knoxville

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Their efforts seem to have started not long after the first charges of age discrimination were filed against the company. At that time, Rohm and Haas began to refrain from referring to available jobs as hourly production jobs, and began to consistently refer instead to Chemical Operators, a term it rarely used in that manner before then. (J.A., pp. 1827, 1909, 1953, 2013 [compare offer letters in Group 10/14/96, J.A., pp. 2429, 2437, 2448, 2460, 2468, 2477, 2485, 2501, 2511, with letters in Group 3/31/97, J.A., pp. 2526, 2533, 2539, 2546, 2551, 2555, 2559, 2563; see also interview letters for New Hire #66, J.A., pp. 2540-41]).

plant, permits any amount of Rohm and Haas production experience to qualify an applicant for its hourly production jobs. (J.A., pp. 1853, 1880, 1610-11, 1797, 1432-33).

Corporate manager Ray Clift and Human Resources manager Charles Clark decided upon the parameters of the work experience criterion over lunch one day, although neither is familiar with the relevant job duties. (J.A., pp. 1875, 1728, 1445-46, 1624, 1716, 1750, 1851-53, 1858, 1871, 1823-27). They did not consult the technical subcommittee appointed to develop hiring criteria, nor did they consult the supervisors who train the employees hired under this criterion. (J.A., pp. 1624, 1745-46, 1875, 1825, 1728). There was no discussion about what work experience was relevant other than that relevance would be determined in the interview. (J.A., pp. 1746). Management knew that its former hourly production workers laid off from the emulsion or polymer departments in 1982 would have worked there for a relatively short time. (J.A., pp. 1610, 1722). Mr. Clark and Mr. Clift discussed that there were no chemical plants in the geographic hiring area, and that it would be rare for an applicant to meet this criterion. (J.A., pp. 1752-54, 1866, 1874).

Before the technical subcommittee received any materials or curriculum from Pellissippi State Technical Community College ["Pellissippi State"], management planned recruitment efforts directed toward students and announced that Pellissippi State would be the main source of new hires for years to come. (J.A., pp. 1809, 1824, 1869, 1617, 1622-23, 1677, 407, 1854). Thereafter, on September 10, 1993, Rohm and Haas received the first materials and curriculum regarding the school's chemical technology program. (J.A., p. 407). The decision to adopt this two year degree program as a hiring requirement was made by

management and conveyed to the technical study team, even though the technical managers recommended that specific changes be made to the program to match the plant's needs. (J.A., pp. 1825, 1868-70, 1763-64, 1790, 1716, 1750). For example, one criticism was that the program did not have the computer skills that Rohm and Haas wanted. (J.A., pp. 1870-71, 1803). No changes were made to the existing program. (J.A., p. 408). In a November letter to the managers involved in the criteria development process, a Rohm and Haas training manager notes that their mission had been recently refocused to meet minimum needs, that Pellissippi State's 2 year degree program exceeded Rohm and Haas' needs, and that since enough students were currently enrolled they would not need to tailor the existing program. (J.A., pp. 1872, 1887, 1641).

The company's emphasis remained on recruiting students while it made significant efforts to avoid its former employees, most of whom were in the protected age group, including the plaintiffs.[9] (J.A., pp. 1642, 1643, 1804, 1807, 1809, 1824, 1899, 1869, [New hire #19] 2164). Assistant personnel director, David Boatman, voluntarily notified several educational institutions about the available jobs, and he communicated by telephone and in person with the

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[9] Each plaintiff is over 40 years old (average age on December 31, 1995 was 51.5 years). (J.A., pp. 1604A, 917). All worked for Rohm and Haas doing various hourly production jobs at its chemical manufacturing plant in Knoxville until they were laid off in 1982. Thirty-three of them worked there for more than five years. All had good work records and were recommended for rehire when laid off. (J.A., pp. 1762, 1627). The plaintiffs maintained a contractual relationship with Rohm and Haas for preferential rehire until 1989, at which time Rohm and Haas rejected a proposal to further extend those rights. (J.A., pp. 1611-12, 1807, 1821).

placement office at Pellissippi State to assist potential applicants. (J.A., pp. 1642, 1656). On the other hand, Rohm and Haas did not tell its former employees about the available jobs, even though they were a potential source of qualified applicants within the industry, and Rohm and Haas had an established practice of contacting them directly with job opportunities. (J.A., pp. 1737, 1756, 1754, 1640-41, 1806-07). Instead, inquiries from former employees were either ignored, discouraged, rejected, or misled. (J.A., pp. 1912, 1457-58, 1447-48, 1479-80, 1484-87, 1489-90, 1493-94, 1496). Mr. Boatman did not return phone calls to former employees. (J.A., pp. 1636, 1638). He did not advise them that a job application was required; even though former employees have never been required to complete new applications. (J.A., pp. 1474, 1458, 1446). Many student applicants were interviewed and offered jobs months before completing their degree requirements. (J.A., pp. 1650, 1670).

Managers claim they wanted to contact any institution they felt would be a source of qualified applicants, but they rejected a request to meet with a committee of former employees about the jobs; even though the union tried to encourage management to consider them. (J.A., pp. 1513-14, 1626-27, 1756-57, 1806-07, 1458). The plant manager told one former employee that he was legally advised not to discuss rehire. (J.A., pp. 1806, 1447). It was not until after these rejections that a former employee filed an unfair labor practices charge with the NLRB. (J.A., p. 1447). Later, in July 1996, former employees began filing EEOC charges. (J.A., pp. 1928-30). At this time, Rohm and Haas had little or no information about the current qualifications of its former employees because most of them did not submit applications until after they went to the EEOC and were advised to do so, despite the apparent futility of this effort.

There were early indications, beginning in late 1992, that Rohm and Haas would not rehire production workers laid off in 1982, regardless of their current qualifications. In late 1992, Knoxville plant managers decided they would not transfer back to Knoxville those employees laid off in 1982 who were still working for Rohm and Haas at its other plants, even though managers offered to transfer back to Knoxville those employees with identical qualifications who were laid off in 1987. (J.A., pp. 1721, 1739-40, 1779, 1799, 1800). About 65 hourly production workers were laid off in 1987 compared to 181 in 1982. (J.A., pp. 1610, 439). Thereafter, on July 14, 1993, personnel manager David Boatman responded to a job inquiry from a former employee, plaintiff Gary White, stating that there were no openings for someone with his experience and educational background. Rohm and Haas had not adopted any hiring criteria nor had it received any curriculum materials at that time. (J.A., pp. 1637, 1701-02). Mr. Boatman did not mention that the company was in the process of preparing for mass future hiring, even though the company notified its former employees of job openings at least five times after the 1982 layoff. (J.A., p. 1737).

Management's efforts to avoid consideration of its former employees culminated on December 6, 1996, the day the Browning lawsuit was filed. On this day, Rohm and Haas stopped accepting job applications, even though it had done so continuously for over 2 ½ years, and even though just a few months earlier it had informed the EEOC that it "will continue to accept applications whether or not a position for Chemical Operator exists as it anticipates vacancies in this position over the next few years." (J.A., pp. 1945, 1718-19, 1726, 1429). Rohm and Haas was receiving an influx of applications from former employees at this time because EEOC personnel had recently suggested they apply. (J.A.,

pp. 1912-1913). Management states that the reason it did not hire nineteen of the plaintiffs in this case is because they failed to properly submit timely applications. (J.A., pp. 1428-30).[10] The company now asserts that it would not have hired them even if they had applied because they did not meet the hiring criteria. None of the plaintiffs were granted an interview.

FACTS RELEVANT TO "PRETEXT" AND THE PATTERN-OR-PRACTICE THEORY

The reasons now offered by Rohm and Haas for not hiring the plaintiffs is that none had relevant work experience or relevant education to qualify them for its hourly production jobs (except for one plaintiff who qualifies but was rejected for purportedly applying for the wrong position). Several plaintiffs have unique qualifications discussed infra at page 20. Here, the plaintiffs discuss evidence of "pretext" common to all plaintiffs: That is, their prior work experience performing hourly production jobs in the plexiglas department at Rohm and Haas' Knoxville chemical plant is relevant to qualify them for the available hourly production jobs. This

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[10] Rohm and Haas claims it did not accept applications between December 6, 1996 and May 4, 1998 [student graduation time], but some applications appear to have been accepted during this time period. (J.A., pp. 2575, 3386, 3379-80). When former employees mailed applications directly to the plant, Rohm and Haas returned them by registered mail, although it did so only to former employees. (J.A., pp. 1725, 1759, 1644-45). Mr. Boatman claims that applications or resumes received at the plant are thrown in the trash; however, students routinely mailed or faxed applications, resumes, transcripts, and other materials directly to the plant, and these were accepted. (J.A., pp. 1637, 1671-72, 2192, 2194, 2088, 2094-96, 2129, 2170-71, 2178-79, 2187-89, 2228, 2231 [New hire#s: 23, 9, 14, 20-22, 25, 26, 28, 31]).

evidence of pretext is relevant to support the plaintiffs' pattern-or-practice theory, although it was not considered as such by the lower courts.

Assistant personnel manager, David Boatman, removed the plaintiffs' applications from consideration purportedly because their prior work experience in the plexiglas department was not relevant to the available hourly production jobs. (J.A., pp. 1638-39, 1805, 315). Mr. Boatman had no input into development of the five year experience criterion, he is not familiar with the duties involved in the hourly production jobs, and he never asked anyone familiar with the available jobs if experience in the plexiglas department was relevant. (J.A., pp. 1624, 1618, 1638-39, 1802-03). If Mr. Boatman had asked the supervisors and trainers familiar with the available jobs, they would have told him that the plaintiffs' prior production experience with Rohm and Haas is relevant to the available jobs. (J.A., pp. 1522-25, 1518, 1513-15).

Other managers, who now assert that hourly production work in the plexiglas department is not relevant to the available jobs, have no experience in the jobs. (J.A., pp. 316, 392, 1716, 1750, 1851-53, 1858, 1871). Furthermore, their actions contradict their assertions because management, until 1994, transferred and rehired plexiglas production workers to work at Knoxville and at other Rohm and Haas plants in non-plexiglas "Chemical Operator" jobs. In 1989 and 1991, Rohm and Haas agreed to give employees laid off from the Knoxville plexiglas operation hiring preference for available "Chemical Operator" jobs. Between 1992 and 1993, the Knoxville plant rehired 26 former employees with essentially the same qualifications as the plaintiffs. (J.A., pp. 1611-12, 1807, 1821, 1925-26). Throughout 1993-94, Rohm and Haas recalled 31 former Knoxville plant plexiglas

employees who were working at its other plants, even though management did not know or consider what jobs these employees were doing, and some were performing mobile equipment operator jobs. (J.A., pp. 1797-98, 1719-20, 1611, 2825-26, 2831). Until the plexiglas department closed in 1987, employees in that department were permitted to bid to available jobs in the emulsion and polymer departments. All hourly production workers were represented by the same union under the same CBA, and reductions in force were based on seniority regardless of the particular department or job. (J.A., p. 1609). Although job descriptions were revised, job duties remained the same. (J.A., 1628-31, 1679-99).

Specifically, Rohm and Haas asserts that the reason the plaintiffs' plexiglas production experience is not relevant is because it did not prepare them to "trouble-shoot" the chemical production process. The company's policy, however, prohibits chemical production workers from trouble-shooting the chemical process. (J.A., pp. 1470-71, 1522-23). Likewise, early interview forms cross out the word "Troubleshooting" and circle "Production." (J.A., pp. 2147, 2150 [New hire #s 16, 17]). The Interview Guide references "troubleshooting" regarding equipment, but not chemicals as Rohm and Haas asserts. (J.A., p. 489).

Rohm and Haas states that the relevant skills which the criteria supposedly represent are knowledge of chemistry, math, and computer skills. (J.A., p. 1940). All new hires are expected to have computer skills, which is asked of the applicants during the interview. Interviews are important because applications do not ask about computer literacy, math, chemistry, or trouble-shooting. (J.A., p. 1614). The Interview Guide does not mention math or chemistry; it emphasizes general plant production skills and troubleshooting

equipment. (J.A., pp. 487-89). Rohm and Haas conducts phone screens with potential applicants to clarify to them that the available jobs involve shift work, plant production work in a union setting, physical labor, and no chance of advancement. (J.A., pp. 1645, 2181, 2196 [New hire #s: 21, 23]).

Rohm and Haas hired many applicants who do not have the skills which it claims are essential, and some applicants do not meet the stated hiring criteria.[11]

Under the five years relevant chemical plant experience criterion, Rohm and Haas hired over sixty-five applicants

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[11] Applicants hired with two year degrees in General Studies, or Science, or Chemistry did not meet the hiring criterion; nor did schools other than Pellissippi have relevant programs, although several applicants were hired with such qualifications. (J.A., p. 1756). The application routing form of one applicant with a degree from Roane State notes "does not meet our 2/4/5 requirements." (J.A., pp. 2346 [New hire #43]). Technical managers perceived applicants who met the two year degree criterion from Pellissippi State as lacking relevant computer skills and work experience. (J.A., pp. 1649, 2035-36, 2042-43, 2151, 2164-65, 2217, 2248-51, 2656 [New hire#s: 2, 3, 17, 19, 26, 30]).

The four year degree criterion was added by management because they did not want to give the appearance of excluding overqualified people. (J.A., pp. 1728, 1744, 1802-03, 1878, 1887). Technical managers perceived these applicants as being overqualified for production work, while lacking important plant skills. (J.A., pp. 2065-66, 2082-84, 2108-09, 2117-19, 2125, 2131-32, 2146, 2181, 2202-03, 2222-25, 2259-62, 2288, 2305-08, 2385-88, 2444-47, 2472-73 [New hire #s: 6, 8, 11-14, 16, 21, 24, 27, 31, 35, 38, 48, 55, 58]). A 4 year degree in chemistry is referred to by management as "a weakly relevant degree," although it hired new employees with that degree. (J.A., pp. 427-29, 2368, 2366, 2013-23[New hire# 46])

based on their production work at A.E. Staley, a manufacturing plant that produces corn sweetener and dog food, and at International Paper, a paper manufacturing plant. (J.A., pp. 1754, 1875, 2013-23). No applicants were hired from the relevant geographic hiring area with chemical plant experience. Management claims that work experience in a chemical plant is more important than computerized process control experience. (J.A., pp. 1880, 1657). Many applicants hired under the experience criterion had a highschool education or less. (J.A., pp. 2325, 2333, 2479, 2487, 2542, 2547, 2556, 2565, 2577, 2583, 2592, 2595, 2607, 2616, 2619, 2623, 2626, 2647, 2660, 2672, 2675, 2682, 2688, 2703, 2707, 2713, 2722, 2728, 2731, 2751, 2768, 2781, 2799, 2801, 2803, 2807, 2809, 2811, 2813, 2815, 2819, 2821, 2823). Most did not have any relevant chemistry or math background. (J.A., pp. 1617-18). Management claims that all new hires should have an understanding of chemistry relevant to the Knoxville plant; such that work in a sugar plant would not qualify, and work in a paper plant would not necessarily qualify either. (J.A., pp. 1863-64). Interviews with these applicants focused on general plant skills, proven ability to do shift work, plant production experience, team work, safety, and/or computer process control experience; but not math or chemistry. (J.A., pp. 2028, 2101-02, 2292, 2337-38, e.g., 2028, 2537). There is usually no way to tell from the job application what fraction of time an applicant spent performing "relevant" skills. (E.g., J.A., pp. 2543, 2797-2824 [New hire #s144-157]).

The company's "experts" who assert that the hiring criteria are relevant to the Chemical Operator job do not offer any support for the company's assertion that the plaintiffs' plexiglas production experience is not relevant to the available hourly production jobs.

FACTS UNIQUE TO INDIVIDUAL CLAIMS SUPPORT THE PATTERN-OR-PRACTICE THEORY

Rohm and Haas states that although plaintiff John Chumlea met the hiring requirements because of his work experience at A. E. Staley, he was not hired because he applied for a Millwright job. Applicants who were substantially younger than Mr. Chumlea were hired even though they did not apply for a chemical operator job either. (J.A., pp. 1668-69, 2072, 2106, 2130-31, 2220, 2222 [New hire#s: 7, 11, 14, 27]). Mr. Chumlea called personnel manager David Boatman, but Mr. Boatman did not return his call. (J.A., p. 1484). When he applied, Mr. Chumlea was not eligible to bid to a Millwright job because he was too old according to the company's age restrictions. (J.A., pp. 574, 1483, 1604A). Other applicants in the protected age group who qualified based on work at A.E. Staley were not hired upon first application but were hired only after Rohm and Haas was sued. (J.A., pp. 1672, 2643, 2646, 2649, 2652, 2662, 2709, 2730; 2020-21 for ages [New hire#s: 97-100, 103, 118, 125 see page two of applications]).

Plaintiff Paul McLain has work experience in Rohm and Haas' emulsion department as well as plexiglas production experience. The duties of Mr. McLain's former job as Assistant Emulsion Operator are essentially the same duties performed by an Emulsion Processor, for which most applicants were hired. (J.A., pp. 1473, 1911-12, 1855-57, 2013-23, 1752). Thus, his prior work experience involved performing the same job for the same company at the same location as the job for which Rohm and Haas was seeking applicants. After his lay off, Mr. McLain took a computer programming course at Pellissippi, but he was not interviewed. (J.A., pp. 1912-13).

Eight plaintiffs have work experience in Rohm and Haas' emulsion department in addition to their work experience in the plexiglas department. (J.A., pp. 494-495).

Plaintiff Chris Connatser has a B.S. in Education and a Masters of Science in technical vocational education. His degree is at least equivalent to the degree of new hire David Manning, who has a B.S. in Education. Plaintiff Connatser's degree is significantly more relevant than, for example, the two year degree in General Studies that qualified a younger candidate. Mr. Connatser also has experience working for Rohm and Haas, and was approved for rehire when laid off. (J.A., pp. 481, 1495-96, 2060-61, 2346, 1646-47 [New hire #s 6, 43]).

Plaintiff Thomas Strickland has a four year degree in marketing in addition to his years at Rohm and Haas. Mr. Strickland's work experience includes work in both the plexiglas department and emulsion department as an Assistant Emulsion Operator. Thus, he too previously performed the same job for which Rohm and Haas was hiring. (J.A., p. 1396).

Rohm and Haas rejected former employee Daniel Butler, even though he worked for more than five years as a Chemical Operator for Martin Marietta after his years at Rohm and Haas. The company acknowledges that chemical operator experience at Martin Marietta is likely relevant under the hiring criteria. The relevance of an applicant's work experience was to be determined during the interview, but Mr. Butler was not offered an interview. (J.A., pp. 1746, 1614, 1494, 1753).

ARGUMENT AND REASONS FOR GRANTING THE WRIT

I. THIS PETITION SHOULD BE GRANTED BECAUSE IT PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW THAT HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

This is a case of first impression in this Court. There are no cases from this Court and very little authority elsewhere discussing summary judgment in a pattern-or-practice discrimination case. The questions presented are of exceptional importance regarding substantive and procedural standards and burdens of proof at the initial summary judgment stage when plaintiffs pursue a pattern-or-practice method of proof as set forth by this Court in *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 360-68, 97 S.Ct. 1843 (1977). The pattern-or-practice framework is different from claims of individualized discrimination because of the order and allocation of proof and nature of trial proceedings.[12] Resolution of the issues in this case will also

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[12] In a pattern-or-practice case, the plaintiffs must "prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts; [they must] establish by a preponderance of the evidence that [age] discrimination was the company's standard operating procedure the regular rather than the unusual practice." *Teamsters*, 431 U.S. at 336, 97 S.Ct. at 1855. The plaintiffs are not required to offer evidence that each person whom will ultimately seek relief was a victim of the employer's discriminatory policy:

> "The proof of the pattern-or-practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy. The [plaintiffs] need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a

resolve a conflict among the circuits on a preliminary matter because at least two circuit courts hold that the pattern-or-practice method of proof is not available in private non-class action lawsuits. *Celestine v. Petroleos de Venezuella, S.A.*, 266 F.3d 343, 355-56 (5th Cir. 2001); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 760 (4th Cir.1998), *vac. on other grounds*, 527 U.S. 1031, 119 S.Ct. 2388, 144 L.Ed.2d 790 (1999); *but cf., Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1108 (10th Cir. 2001) (need not certify as an ADEA class to use this method of proof in a private action). The Sixth Circuit assumes for purposes of its decision in this case that the pattern-or-practice method of proof is available in private non-class action cases brought under the ADEA. *See also, Adams v. Ameritech Services Inc.*, 231 F.3d 414 (7th Cir. 2000) (private pattern-or-practice class action under ADEA).

The Tenth Circuit, in *Thiessen*, engaged in a thoughtful analysis of the difficult issues, while acknowledging a lack of

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> potential victim of the proved discrimination. . . .The burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons."

Teamsters, at 362, 97 S.Ct 1868. The plaintiffs' burden is to establish a prima facie case that such a policy existed. The burden then shifts to the employer to demonstrate that the plaintiffs' proof is either inaccurate or insignificant. *Id.*, at 360, 97 S.Ct 1867. If an employer fails to rebut the inference that arises from the plaintiffs' prima facie case, a court may conclude that a violation has occurred. *Id.*, at 361. After the liability phase of the trial, additional proceedings may be conducted to determine the scope of individual relief. *Id.*

case authority or guidance in the law. *Thiessen* at 1108.[13] The Tenth Circuit reversed summary judgment against plaintiff Thiessen, holding that "the first stage issues in this pattern-or-practice case have yet to be resolved. Thus, Thiessen's claims cannot at this point be treated as non-class claims of individual discrimination or analyzed under the *McDonnell Douglas* framework." *Thiessen* at 1109.

In this case, the plaintiffs' summary judgment response brief did not explain the relevance of the *McDonnell Douglas* analysis to the *Teamsters* framework at the summary judgment stage because there was little if any meaningful authority on this subject. The Tenth Circuit decided its first version of *Thiessen* after the plaintiffs responded to the defendant's motion for summary judgment. 255 F.3d 1221 (10th Cir. 2001). The plaintiffs filed a supplemental brief in the district court to clarify the proper application of the pattern-or-practice framework to this case. After the district court dismissed this case, but before appellate briefs were due in the Sixth Circuit, the Tenth Circuit "reconsidered" its

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[13] The Tenth Circuit also stated:

> "Until the first stage is resolved, *we question* whether it is proper for a court to consider summary judgment motions regarding second stage issues (i.e., whether individual plaintiffs are entitled to relief). Even *assuming, arguendo*, such motions can properly be considered prior to resolution of the first stage, it is clear they would not be analyzed under the typical *McDonnell-Douglas* framework. . . . Instead, they would operate under the presumption that (1) defendants had in place a pattern or practice of discrimination, and (2) all employment decisions regarding the class plaintiffs were made pursuant to that pattern or practice.

Thiessen at 1109 (*citing, Teamsters*, 431 U.S. 324, 362, 97 S.Ct. 1843 (1977) (emphasis added).

decision in *Thiessen* to further articulate the appropriate summary judgment analysis when ADEA plaintiffs rely on the pattern-or-practice theory. 267 F.3d 1095, 1108 (10th Cir. 2001). The judges who heard this case for the Sixth Circuit also expressed frustration with the complexity of the issues and the lack of guidance. (App., at 42a-43a).

It is central to the pattern-or-practice method of proof that the plaintiffs are not required to offer evidence that each person whom will ultimately seek relief was a victim of the employer's discriminatory policy. *Teamsters*, at 360, 97 S.Ct 1867. As stated by this Court, "it could not be more plain that the rejection of a claim of classwide discrimination does not warrant the conclusion that no member of the class could have a valid individual claim." *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 878, 104 S.Ct. 2794 (1984). Thus, the decision to dismiss all individual claims at the initial stage of summary judgment proceedings conflicts with precedent from this Court because it disregards that fundamental principle of the pattern-or-practice method of proof. Each plaintiff in this case is entitled to a fair opportunity to fully present their individual claim of discrimination, which they were not required to do at this stage of their pattern-or-practice case.

This court should establish fair standards, uniformity, and guidance on these novel and important federal questions regarding the appropriate legal analysis and quantum of evidence sufficient to raise a genuine issue of material fact as to whether a defendant engaged in a pattern-or-practice of discrimination. Proper resolution of the issues in this case will give much needed guidance to practitioners and the lower courts in an important area of federal law in great need of clarification from this Court.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE LOWER COURTS' DECISIONS SO FAR DEPART FROM THE ACCEPTED AND USUSAL COURSE OF JUDICIAL PROCEEDINGS, AS TO CALL FOR THIS COURT'S SUPERVISORY POWER.

The Sixth Circuit creates new heightened notice prerequisites resulting in unfair burdens on plaintiffs pursuing pattern-or-practice claims of discrimination. Guidance in the law is needed, not additional burdens on civil rights plaintiffs. The lower courts essentially reverse the burdens of proof under Federal Rule of Civil Procedure 56 by granting summary disposition on plaintiffs' pattern-or-practice claim when Rohm and Haas expressly chose to not address the theory, and the district court did not resolve it. The plaintiffs complied with all applicable rules of procedure, local rules, and court orders. They fully articulated the law relevant to the *Teamsters* method of proof, including the bifurcated nature of proceedings, and requested that the district court apply this framework to the facts of this case. The district court acknowledged the plaintiffs' assertion of this theory; however, it dismissed all individual claims without taking into consideration the orders of proof peculiar to pattern-or-practice cases. The district court's failure to address this theory was not based on lack of notice, it was likely based on the lack of authority in the law to guide it's analysis of the *Teamsters* method of proof at the summary judgment stage; otherwise it probably would not have acknowledged the plaintiffs' theory without addressing it. This Court should reject the Sixth Circuit's new heightened notice prerequisite for civil rights plaintiffs pursuing pattern-or-practice discrimination cases.

III. THIS PETITION SHOULD BE GRANTED BECAUSE THE SIXTH CIRCUIT DECISION CONFLICTS WITH THIS COURT AND OTHER CIRCUITS.

Under a *McDonnell Douglas* analysis, the Sixth Circuit rejected significant evidence of pretext presented by the plaintiffs when it held that "pretext may not be shown by attacking the adverse employment decision itself," and the "soundness of an employment decision may not be challenged as a means of showing pretext." (App., at 9a). This standard was plucked from *Hein v. All America Plywood Co.*, 232 F.3d 482 (6th Cir. 2000) and *Brocklehurst v. PPG Indus., Ind.*, 123 F.3d 890 (6th Cir. 1997), and directly defies established precedent in this Court, including *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), as well as being contrary to precedent in the Sixth Circuit.[14] *Brocklehurst* was decided before *Reeves* and *Kline v. Tennessee Valley Authority*, 128 F.3d 337 (6th Cir. 1997), and espouses the pretext-plus standard later rejected in *Kline* and *Reeves*. The *Hein* case simply cites *Brocklehurst* for that same rejected legal proposition. Consideration by this Court is necessary to halt the Sixth Circuit's flawed analysis which is grounded on bad law.

To the extent the *McDonnell Douglas* analysis is relevant at this stage of this pattern-or-practice case, the plaintiffs meet the qualifications element of their prima facie case because

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[14] *See e.g., Kline v. Tennessee Valley Authority*, 128 F.3d 337 (6th Cir. 1997) (rejects pretext-plus standard); *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 576-77 (6th Cir. 2003) (explains standards to challenge the "honest belief" or "business judgment" defense).

they all have several years of work experience in chemical plant operations; they also had good work records with Rohm and Haas performing hourly production jobs at the same chemical plant for which the company is now hiring hourly production workers; their prior work experience at Rohm and Haas is equivalent to the minimum objective criteria required for employment in the relevant field as is demonstrated by the fact they meet hiring criteria used at other Rohm and Haas plants with similar manufacturing processes. Thirty-three of the plaintiffs also meet the objective aspect of the Knoxville plant's *stated* hiring criteria: that is, they have more than five years experience in chemical plant operations. The dispute arises over whether the plaintiffs' work experience or education is *relevant*. Because this dispute is defined by the company's articulated reason for rejecting the plaintiffs, the issue is "pretext:" Is the company's asserted reason for rejecting the plaintiffs a pretext for age discrimination?

Here, the decision makers assert that plexiglas production experience is not relevant chemical plant experience. The plaintiffs' undermined this assertion with evidence relevant to all three alternative avenues for demonstrating pretext under the *McDonnell Douglas* analysis and its progeny. One piece of this circumstantial evidence was testimony from supervisors and trainers who were in a better position than the decision makers to know who is qualified, stating that the plaintiffs prior work experience with Rohm and Haas is relevant to qualify them for the jobs. (J.A., pp. 1522-25, 1518, 1513-15). This Court, in *McDonnell Douglas,* states that evidence that the employer "misjudged the qualifications of the applicants does not in itself expose [the employer] to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination." 450 U.S. 248, 259, 101 S.Ct. 1089 (1981). This statement cannot be reconciled with the Sixth Circuit's rejection of the

plaintiffs' evidence contradicting the decision makers assertions and demonstrating their qualifications for the jobs. Other circuit courts hold that this type of evidence creates a genuine issue of material fact as to whether the plaintiffs are qualified for purposes of their prima facie case and pretext.[15] Moreover, the supervisors' affidavits were only one piece of the plaintiffs' circumstantial evidence.

It is fundamental to the plaintiffs' proof of pretext that they attack the adverse employment decision and challenge the soundness of that decision. For example, management's assertion that its hiring criteria are relevant because they let workers bid to the Chemical Operator job is so lacking in logic that it is unworthy of credence. The Company's assertion is like saying that all hourly production workers should meet hiring criteria for accountants because they might want to apply for an accountant job some day at Rohm and Haas; or all hourly production workers should meet hiring criteria for every mechanical job because Rohm and Haas permits them to bid to any mechanical job. An inference may be drawn that the hiring criteria are a pretext for discrimination because they are not relevant to seventy percent of the available jobs. Managers' assertions of relevance are unworthy of credence, and their attempts to portray these jobs as something they are not is evidence of mendacity. The Sixth Circuit's rule in this case prohibits this type of evidence of pretext and the language is broad enough that it could be invoked to reject most types of circumstantial evidence.

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[15] The Sixth Circuit is at odds with other circuit courts. *See e.g., Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 644 (11th Cir. 1998); *accord Lyoch v. Anheuser-Busch Companies, Inc.*, 139 F.3d 612, 615-16 (8th Cir. 1998); *Thomas v. Denny's Inc.*, 111 F.3d 1506, 1510 (10th Cir. 1997); *Danzer v. Norden Systems, Inc.*, 151 F.3d 50, 55 (2d Cir. 1998).

Finally, the Sixth Circuit analysis lumps all thirty-six plaintiffs together, and improperly relies on evidence from the Browning case to hold that the plaintiffs' experience in plexiglas operations was not relevant to qualify them for the available jobs. It completely disregards all evidence unique to each case, such as: Rohm and Haas admits that at least one plaintiff was indeed qualified; many had obtained relevant work experience after leaving Rohm and Haas but the company rejected them before considering this experience; several had work experience doing the exact jobs for which Rohm and Haas was hiring; several were rejected because Rohm and Haas claimed they had not timely applied; and some had relevant education under the criteria. To the extent that a *McDonnell Douglas* analysis or any elements thereof are relevant at the initial summary judgment proceedings in this pattern-or-practice case, the individual claims of age discrimination against Rohm and Haas should not have been dismissed without consideration of the evidence unique to each case.

CONCLUSION

The lower courts intruded on the role of the jury by granting summary judgment to Rohm and Haas. The petitioners pray for an order granting certiorari, vacating the judgment, and remanding the case to the district court for a jury trial under the pattern-or-practice method of proof.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-6273

[Filed July 23, 2003]

ROBERT E. STOOKSBURY, ET AL., Plaintiffs-Appellants,	)
v.	)
ROHM & HAAS TENNESSEE, INCORPORATED, Defendant-Appellee.	)

BEFORE: SUHRHEINRICH and COLE, Circuit Judges; and CARR,* District Judge.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

* Hon. James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

on the suggestion for rehearing en banc the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-6273

[Filed May 28, 2003]

ROBERT E. STOOKSBURY, ET AL., Plaintiffs-Appellants,	)
v.	)
ROHM & HAAS TENNESSEE, INCORPORATED, Defendant-Appellee.	)

On Appeal from the United States District Court for the Eastern District of Tennessee

BEFORE: SUHRHEINRICH and COLE, Circuit Judges; and CARR,* District Judge.

* Hon. James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

OPINION

Per Curiam. This appeal consists of three lawsuits in which thirty-six plaintiffs alleged that Defendant Rohm & Haas Company ("Rohm & Haas") discriminated against them based on age, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § § 621 *et seq.* ("ADEA"), and the Tennessee Human Rights Act, Tenn. Code Ann. § § 4-21-101 *et seq.* ("THRA"), when it failed to hire them fourteen years after they had been laid off pursuant to a reduction-in-force. The district court granted Defendant's motion for summary judgment on the ground that Plaintiffs failed to raise a genuine issue of material fact as to whether they had been discriminated against because of age when Rohm & Haas did not hire them. Plaintiffs now appeal the grant of summary judgment, arguing (1) that the district court erred in failing to conduct its analysis under a pattern or practice framework; and (2) that summary judgment was inappropriate under the *McDonnell-Douglas* framework because Plaintiffs raised genuine issues of material fact as to whether they were qualified for positions at Rohm & Haas and whether Defendant's reasons for failing to hiring Plaintiffs were pretextual. For the reasons discussed herein, we **AFFIRM** the judgment of the district court.

In 1996-1997, four age discrimination cases were filed against Rohm & Haas by former employees who had been laid off during a 1982 reduction-in-force at the company's Knoxville plant. In each case, the Plaintiffs, none of whom had worked for Rohm & Haas since being laid off, alleged that the company refused to hire them because of their age when they applied for employment in the mid-1990s. The Plaintiffs also claimed that the company's newly adopted hiring criteria were a pretext for discrimination. In the first action, *Browning v. Rohm & Haas Tenn., Inc.*, 16 F. Supp.

2d 896 (E.D. Tenn. 1998), the district court granted Defendant's motion for summary judgment, and a panel of this Court affirmed on appeal, 194 F.3d 1311 (6th Cir. 1999) (table), *cert. denied*, 530 U.S. 1243, *rehearing denied*, 530 U.S. 1296 (2000). While the appeal was pending in *Browning*, the three other cases were consolidated. On October 6, 2000, Defendant filed a motion for summary judgment, which the district court granted on September 7, 2001. Plaintiffs timely initiated the current appeal.

Plaintiffs first argue that the district court erred in failing to consider the pattern or practice framework in evaluating their claims, noting that the *McDonnell-Douglas* framework does not apply to such claims. Plaintiffs maintain that they alleged a pattern or practice theory in their complaints and also filed a supplemental brief with the district court, in which they asserted that the *McDonnell-Douglas* framework does not apply to a pattern or practice case at the summary judgment stage. Relying on *Thiessen v. General Electric Capital Corporation*, 267 F.3d 1095 (10th Cir. 2001), Plaintiffs contend that the district court inappropriately analyzed their claims, and that summary judgment is inappropriate as to their claims under a pattern or practice theory of discrimination.

The district court did not err when it failed to consider Plaintiffs' claims under a pattern or practice framework. First, Plaintiffs did not properly raise their discrimination claims under a pattern or practice theory. Plaintiffs never filed a trial plan stating that they were proceeding only under a pattern or practice framework. Nor did Plaintiffs notify the district court or Defendant that they were proposing a bifurcated proceeding under the pattern or practice theory. Moreover, while Plaintiffs' complaints state in a conclusory fashion that

Defendant engaged in a pattern or practice of discrimination, Plaintiffs' response to Defendant's motion for summary judgment focused on their individual disparate treatment claims and the treatment of such claims under the *McDonnell-Douglas* framework. Plaintiffs mention the pattern or practice framework, as well as a disparate impact theory of discrimination, only as an additional methods to prove their claims. Consequently, they cannot now argue that the district court's analysis under the *McDonnell-Douglas* framework was inappropriate.

In any event, even if the pattern or practice theory were properly raised, Plaintiffs would not be entitled to relief under this theory. During the first stage of a pattern or practice case, the plaintiff's burden is "to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977). The "plaintiff bears the burden of showing 'by a preponderance of the evidence that [age] discrimination was the company's standard operating procedure--the regular rather than the unusual practice.'" *Adams v. Ameritech Services, Inc.*, 231 F.3d 414, 422 (7th Cir. 2000) (quoting *Teamsters*, 431 U.S. at 336). In this case, Plaintiffs have failed to raise a genuine issue of material fact that the hiring policy at issue is discriminatory. The hiring criteria are age neutral, and there is no evidence to suggest that Rohm & Haas implemented the criteria in order to discriminate against older workers. *Cf. Thiessen*, 267 F.3d 1095 (involving allegations of a blocker policy, aimed at removing older employees who were blocking the advancement of younger, newly recruited employees). Since Plaintiffs have not submitted evidence from which a

reasonable jury could conclude that the adoption of the hiring criteria was motivated by discriminatory reasons, or that age discrimination was the company's standard operating procedure, Plaintiffs would not succeed under a pattern or practice theory.

Plaintiffs also argue that the district court erred in its application of the *McDonnell-Douglas* framework. First, Plaintiffs contend that the district court incorrectly used the company's nondiscriminatory explanation for its hiring decision-its hiring criteria--as the benchmark for determining whether Plaintiffs were qualified for chemical positions. Plaintiffs argue that there is a genuine issue of material fact as to whether they were qualified.

This argument lacks merit. In *Wexler v. White's Fine Furniture*, 317 F.3d 564 (6th Cir. 2003) (en banc), this Court "explicitly set forth what is required for a plaintiff to satisfy the qualification prong of the prima facie test" in a discrimination action. *Id.* at 575. According to the Court,

> At the prima facie stage, a court should focus on a plaintiff's *objective* qualifications to determine whether he or she is qualified for the relevant job. The prima facie burden of showing that a plaintiff is qualified can therefore be met by presenting credible evidence that his or her qualifications are at least equivalent to the minimum objective criteria required for employment in the relevant field. Although the specific qualifications will vary depending on the job in question, the inquiry should focus on criteria such as the plaintiff's education, experience in the relevant

> industry, and demonstrated possession of the required general skills.

Id. 317 F.3d 564 at 575-76 (citations omitted).

While *Wexler* was decided after the district court issued its decision in this case, the district court's judgment that Plaintiffs' experience in the plexiglas operations was not relevant and that Plaintiffs had failed to demonstrate a genuine issue of material fact that they were qualified was based on an objective consideration of the qualifications required for employment in the relevant field (chemical operations). *See Wexler*, 317 F.3d at 576. The district court relied on the district court's analysis in *Browning*. There, in considering whether the plaintiffs had met their burden on the qualifications prong, the district court considered objective factors that the *Wexler* Court found important to the qualifications inquiry: "criteria such as the plaintiff's education, experience in the relevant industry, and demonstrated possession of the required general skills." *Wexler*, 317 F.3d at 576. The district court carefully considered the Plaintiffs' work experience in the plexiglas operation, and examined the skills required for a chemical operator. Furthermore, the district court considered detailed affidavits, which described the skills and training necessary for employment in the respective positions. *Browning*, 16 F. Supp. 2d at 906. With regard to experience in the relevant industry, the district court concluded that the plexiglas operation was not relevant. *Id.* at 907. Therefore, based on an objective inquiry, Plaintiffs did not establish that they possessed the skills required for work in chemical operations.

Even if there were a genuine issue of fact as to whether Plaintiffs were qualified for positions in chemical operations, summary judgment is proper because there is no genuine issue of material fact as to whether Defendant's reasons for not hiring Plaintiffs were pretextual. The evidence presented by Plaintiffs simply does not create a triable issue on the issue of pretext. Plaintiffs were not hired because they failed to meet the hiring criteria. Those who were hired did meet the hiring criteria. Plaintiffs' attempt to demonstrate pretext by introducing affidavits of supervisors, which they allege demonstrate that Plaintiffs were just as qualified as other applicants who were hired, does not create a genuine issue of material fact as to whether the hiring criteria are a pretext for age discrimination. *See Hein v. All America Plywood Co.*, 232 F.3d 482, 489-90 (6th Cir. 2000) (stating that pretext may not be shown by attacking the adverse employment decision itself); *Brocklehurst v. PPG Indus., Inc.*, 123 F.3d 890, 898 (6th Cir. 1997) (holding that soundness of an employment decision may not be challenged as a means of showing pretext).

After a careful review of the record, applicable law, the parties' briefs, and oral argument by counsel, we conclude that the district court did not err in granting summary judgment in favor of Defendant. The district court did not err in analyzing Plaintiffs' claims under the *McDonnell-Douglas* framework, and the district court properly concluded that, under that framework, there were no genuine issues of material fact and summary judgment was appropriate. As the district court accurately described the evidence and reached the correct legal conclusion on the facts of this case, no useful purpose would be served by issuing a full opinion. We thus

AFFIRM the district court's judgment in favor of Defendant on the basis of its well-reasoned opinion.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE

No: 3:97-cv-34
3:97-cv-341
3:97-cv-562

[Filed September 7, 2001]

ROBERT E. STOOKSBURY, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
ROHM & HAAS	)
TENNESSEE, INC.,	)
Defendant.	)
	)

MEMORANDUM OPINION

These consolidated civil actions are before the court on the motion of the defendant Rohm and Haas Company for summary judgment [doc. 35]. The plaintiffs have responded [doc. 53], and the defendant has filed a reply brief [doc. 64]. The defendant has also filed a brief providing the court with supplemental authorities [doc. 73]. The court finds that oral argument will not be necessary, and the motion is ripe for the

court's consideration. For the reasons discussed below, the defendant's motion for summary judgment will be granted.

These three cases were filed along with another, *Browning v. Rohm and Haas Tennessee, Inc.*, No. 3:96-cv-1010. The plaintiffs in *Browning* were similarly situated to the plaintiffs in these three cases, and their claims against the defendant were nearly identical. This court granted summary judgment to Rohm and Haas in *Browning* (*Browning v. Rohm and Haas Tennessee, Inc.*, 16 F. Supp. 2d 896 (E.D. Tenn. 1998)), and the Sixth Circuit affirmed this court's decision (*Browning v. Rohm & Haas Company*, No. 98-6186 (6th Cir. Oct. 29, 1999)). The plaintiffs in *Browning* petitioned the United States Supreme Court for a writ of certiorari, which the Supreme Court denied.

In their complaints, the thirty-six plaintiffs[1] allege that the defendant violated both the Age Discrimination in Employment Act (ADEA) (29 U.S.C. §§ 621 *et seq.*) and the Tennessee Human Rights Act (Tenn. Code Ann. §§ 4-21-101 *et seq.*) by failing to hire them nearly fourteen years after they had been laid off by the defendant during a reduction in force. All the plaintiffs are over the age of forty. The plaintiffs claim that the defendant adopted a new hiring policy which had the effect of making younger employees eligible for vacant job positions instead of the plaintiffs who were more qualified by virtue of their former employment with the defendant. The plaintiffs contend that the defendant has engaged in a pattern and practice of discrimination against older employees. The

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[1] Originally, there were forty-nine plaintiffs, but twelve of them have been dismissed and one has died.

plaintiffs seek compensatory and punitive damages as well as an injunction directing the defendant to hire the plaintiffs.

The defendant denies that age was a factor in its decision not to hire the plaintiffs. The defendant says that the plaintiffs were not hired because they had no legal or contractual right to be hired and they did not meet the hiring criteria adopted by the company. The defendant says that the hiring criteria have a manifest relationship to the duties of the jobs the plaintiffs seek and the criteria serve the legitimate goals of the company.

I. SUMMARY OF THE BROWNING DECISIONS

The following factual summary has been compiled from the previous opinions of this court and the Sixth Circuit in *Browning*. Rohm and Haas has a chemical plant in Knoxville, Tennessee, that manufactures emulsions and low molecular weight polymers used in paints, textiles, water treatment, and detergents. Prior 1987, Rohm and Haas also maintained a plexiglas operation in Knoxville. The *Browning* plaintiffs, as well as all the plaintiffs in this case, worked in the plexiglas operation until 1982 when they were laid off due to a reduction in force. At the time they were laid off, all the plaintiffs were given the option of applying for other jobs at the Knoxville plant or at other Rohm and Haas plants, but none of them pursued this option.

Under their collective bargaining agreement, the plaintiffs had recall rights for three years after their lay-off. They were not recalled within this time, and the plaintiffs were notified that their recall rights had expired. The union was able to negotiate preferential rehiring rights for two consecutive two-

year periods for the 1982 laid-off employees, but these rights expired in March 1989, and none of the plaintiffs were given the option of exercising their preferential rehiring rights. In fact, all of the plaintiffs' positions were abolished in December 1987 when the plexiglas operation was permanently closed. Those employees laid off in 1987 when the plexiglas plant closed were given the same three-year recall and four-year preferential rehiring rights as those employees laid off in 1982.

It is undisputed that Rohm and Haas did not hire any new hourly production employees from 1979 to 1993. But by 1993, Rohm and Haas management determined that it would need to hire and train new hourly production employees for their chemical operation because there would likely be numerous vacancies in the future due to the retirement of its senior employees. By this time, Rohm and Haas had made an offer to fifty-five of the 1987 laid-off employees who chose to transfer to other Rohm and Haas chemical plants to come back to Knoxville and work in the chemical plant. Only thirty-one chemical operators, average age fifty-two, accepted the offer to transfer back to Knoxville.

It was the opinion of management for Rohm and Haas that the chemical operations had become more complex and required skills (*e.g.*, computer skills) that had not been needed in the past. A committee was formed to consider the hiring criteria for the new hourly production workers in chemical operations. The hiring committee determined that the new hires should have computer skills, a strong background in organic chemistry and mathematics, consciousness of environmental and safety concerns, and the ability to read and write above a twelfth-grade level. The company believed that

if its new hires had these skills; they would be easier to train and would have the math and chemistry necessary to trouble-shoot the chemical processes. The committee recommended that Rohm and Haas adopt the following hiring policy for its Knoxville chemical plant:

> Due to the complex demands of operating a chemical plant in an increasingly competitive environment, we have established the following requirements for those applicants seeking hourly production jobs.
>
> An Associate Degree in Chemical and Environmental Engineering Technology from Pellissippi State (or equivalent degree from another school), or
>
> Five years of relevant experience in chemical plant operations or
>
> A relevant four year degree from an accredited college or university.
>
> This policy will go into effect when the current list of former employees with rehire eligibility is exhausted.

Rohm and Haas management believed that there was a strong correlation between these hiring criteria and the job duties of a chemical operator. Further, a study managed by Kenneth Chapman, head of Technician Resources/Education for the American Chemical Society, found that chemical plants in 1993 needed entry level operators who have better knowledge and skills than their predecessors, especially in the areas of science, math, and computers. "the study determined that chemical companies could no longer take employees with little

or no formal training and train them in math and science on-the-job. Chapman was of the opinion that Rohm and Haas' hiring criteria were "job related and consistent with business necessity in that the criteria have a manifest relationship to the Chemical Operators' employment and substantially promote the proficient operation of Rohm and Haas' business."

The hiring criteria have been used by Rohm and Haas since September 1994, and all new hires have met one or more of the criteria.[2] Rohm and Haas management believe that the hiring criteria have been "an unqualified success from both a cost and performance standpoint."

Based on these facts, this court and the Sixth Circuit found that there was no material issue of fact concerning whether the plaintiffs had not been hired as chemical operators because of their age. Using a modified *McDonnell Douglas* analysis, it was determined that the plaintiffs could not satisfy the "qualified" prong of their prima facie case because their experience in the plexiglas operation was not relevant chemical plant experience under the hiring criteria. This court held, and the Sixth Circuit agreed, that Rohm and Haas made a reasonable business judgment that the plaintiffs' prior experience in the plexiglas operation did not qualify them for employment under the new hiring criteria because the plaintiffs, job duties while working in the plexiglas operation had little bearing on the responsibilities of a modern chemical operator. The chemical operation was always more complex than the plexiglas operation, and it had become more

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[2] This includes the thirty-one employees who transferred from other chemical plants because they all met the five-year relevant chemical plant operations criterion.

technologically sophisticated, especially in the area of computerization, since 1982 when the plaintiffs were laid off. Thus, the plaintiffs were unable to make out a prima facie case of age discrimination.

The plaintiffs also argued that the adoption and implementation of the hiring criteria were a pretext for age discrimination. The Sixth Circuit agreed with this court that Rohm and Haas' perception that it needed more highly qualified and educated chemical operators was a reasonable business judgment, and the hiring criteria were related to that need. The hiring criteria are age neutral, and the plaintiffs were unable to establish any genuine issue of fact that use of the hiring criteria were a "veiled effort at screening out older applicants," instead of a reasonable business decision on the part of Rohm and Haas.

The plaintiffs' statistics were rejected because they were not tailored to the relevant labor pool. Further, not all of the new hires were younger than forty years old. From September 1994 when the first employees were hired using the hiring criteria to August 1998, the date this court decided *Browning*, fourteen of the eighty-one new hires were over forty years old. The Sixth Circuit found that these statistics do not support a finding of age discrimination.

Finally, the plaintiffs argued that Rohm and-Haas' support of the two-year program at Pellissippi State demonstrated the company's age animus. This court and the Sixth Circuit found that the support for the program was based on a preference for a better educated labor pool with the specific skills Rohm and Haas believed it needed for future chemical operators. Older persons could enroll in the program and be considered for

employment if graduated just like younger persons. The Sixth Circuit found that the plaintiffs' circumstantial evidence of age discrimination was unpersuasive.

For these reasons, the Sixth Circuit affirmed this court's summary judgment in favor of Rohm and Haas.

II. THE PLAINTIFFS' EFFORTS TO DISTINGUISH BROWNING

A. Case-Specific Facts

Like the plaintiffs in *Browning,* the plaintiffs in these cases became aware that Rohm and Haas was hiring new hourly production workers for its chemical operation and some of them applied for positions, but many did not or their applications were not filed on time or with the appropriate agencies.[3] All the plaintiffs filed timely EEOC complaints. The plaintiffs' answers to the defendant's interrogatories reveal that all but three of the plaintiffs claim that they meet the hiring criteria because of their five years of experience in

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[3] Rohm and Haas had open periods for applications for hourly production jobs from May 16, 1994, through December 6, 1996; from May 4, 1998, through September 8, 1998; from April 12, 1999, through August 13, 1999, and since January 3, 2000. Applications had to be submitted to the Tennessee Department of Employment Security or the Knoxville Urban League; Rohm and Haas does not accept applications sent directly to the plant.

the plexiglas operation at skilled or-semi-skilled jobs.[4] Specifically, thirty of the plaintiffs claim that their five years of experience in the plexiglas operation makes them eligible for employment in the chemical operation. Some of these thirty did not file timely applications or any application at all. Two more of the plaintiffs (Bowling and Hancock) admit that they do not meet any of the hiring criteria, and one plaintiff (White) claims-that he meets the five-year experience criterion but, in fact, he worked in the plexiglas operation for fewer than five years.

The last three plaintiffs (Chumlea, Connatser, and Strickland) claim that they meet the five-year experience criterion because of their plexiglas experience plus they have other qualifications. Chumlea claims his five-year plexiglas experience and A.E. Staley technical experience qualified him for employment as a chemical operator. Chumlea's experience at A.E. Staley would have likely met the experience criterion[5] and he filed a timely application; however, he applied for a position as a millwright, not a chemical operator. Based on the collective bargaining agreement, millwright positions at the Knoxville plant must be filled by incumbent employees under specific bidding procedures, and his application was rejected. Connatser claims he meets the hiring criteria due to his five years of experience in the plexiglas operation, his college degrees in education, and other relevant RobertShaw

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[4] A summary of the plaintiffs'-interrogatory responses is an exhibit to the affidavit of Charles A. Clark, the Director of Human Resources for Rohm and Haas in Knoxville. *See* doc. 40, exh. 13.

[5] There were some newly hired employees who met the hiring criteria due to their work experience at A.E. Staley.

experience. Rohm and Haas determined that Connatser's college degree and his RobertShaw experience were not relevant to a chemical operator's job. Strickland claims that his five years of experience in the plexiglas operation and his college degree in marketing meet the hiring criteria. Rohm and Haas determined that his four-year degree in marketing was not a relevant four-year degree for purposes of the hiring criteria.

The plaintiffs hired an expert to prepare statistical data to support their claims of age discrimination. Dr. James L. Schmidhammer was given data concerning the birth dates of the plaintiffs and the new hires. He opined that there is a statistically significant difference between the ages of the plaintiffs and ages of the persons hired before December 6, 1996,[6] that the plaintiffs were all over the age of forty while most of the new hires were under the age of forty. Dr. Schmidhammer also found a statistically significant difference between the ages of the persons hired before December 6, 1996, and those hired after December 6, 1996, in that there was a significant increase in number of persons over the age of forty hired after the lawsuit was filed. Finally, Dr. Schmidhammer found that the age distribution and educational profile of the individuals hired by Rohm and Haas prior to the filing of the lawsuit does not resemble the age distribution and educational profile of either the general population of the United States or the population of Knox County, but he recognizes that this conclusion might change if relevant experience was considered. The plaintiffs also rely on the fact

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[6] December 6, 1996, was the date the *Browning* lawsuit was filed in federal court.

that the average age of the workers at Rohm and Haas is lower since the company started hiring new workers.

B. Legal Arguments

In order for a non-moving party to defeat a motion for summary judgment, the non-moving party must come forward with persuasive evidence to support his or her claim that there is a genuine factual dispute; that is, the non-moving party must produce evidence on which the jury could reasonably find for the non-moving party. "The 'mere possibility' of a factual dispute is not enough." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992) (quoting *Gregg v. Allen-Bradley Co.*, 801 F.2d 859 863 (6th Cir. 1986)). "[T]his standard requires a court to make a preliminary assessment of the evidence, in order to decide whether the plaintiff's evidence concerns a material issue and is more than *de minimus.*" *Hartsel v. Keys,* 87 F.3d 795, 799 (6th Cir. 1996), *cert. denied,* 519 U.S. 1055 (1997).

The plaintiffs in the consolidated cases pending before this court are in the same position as the plaintiffs in *Browning*. Therefore, in its motion for summary judgment, Rohm and Haas relies on the reasoning and findings of this court and the Sixth Circuit in *Browning*. The company says that, like the plaintiffs in *Browning,* the plaintiffs in these cases cannot establish a prima facie case of age discrimination because they cannot show that they were qualified for the chemical operator positions. In addition, in *Browning* the hiring criteria were found to be valid and not a pretext for age discrimination and the same finding should result here. The plaintiffs argue, however, that a substantial amount of additional evidence has been gathered since this court decided *Browning,* and the

United States Supreme Court and the Sixth Circuit have decided cases which "clarify the law in ways that directly benefit the plaintiffs' efforts to overcome a summary judgment."

1. Additional Facts

In spite of the fact that the plaintiffs in these cases are similarly situated to those in *Browning* and the same hiring criteria are at issue, the plaintiffs say that their case should have a different outcome because there is a "substantial amount of additional evidence" available and these additional facts change the outcome of the motion for summary judgment.

a. Chemical Operators vs. Hourly Production Workers

First, the plaintiffs contend that not all the new hires were hired as chemical operators but were hired as hourly production workers, and this distinction is important. In fact, the plaintiffs accuse Rohm and Haas of mendacity because of the timing in the use of these two terms. They say' that Rohm and Haas used the term "hourly production jobs" before complaints were filed with the EEOC, but thereafter the positions were called "chemical operator" positions. According to the plaintiffs, not all hourly production jobs require the level of knowledge and skill Rohm and Haas claims is necessary for chemical operator jobs. The plaintiffs say that a jury could find that the use of these two terms demonstrates an animus for older workers.

In response, Rohm and Haas has supplied the court with supplemental affidavits of David A. Boatman and Charles A.

Clark, managers of Rohm and Haas. They say that the term chemical operator is a generic term used to denote hourly production jobs in the chemical plant. In 1994, well before the EEOC complaints were filed, in letters sent to the Tennessee Department of Employment Security and the Knoxville Urban League, Boatman used the term "chemical operator" to denote hourly production jobs, and the terms have been used interchangeably since. These jobs cover different skill levels, but once a person is hired for an hourly production job they may bid on other jobs as provided by the collective bargaining agreement. Thus, the hiring criteria are just as necessary for the less skilled jobs as for the more skilled jobs because of the bidding procedures allowed by the collective bargaining agreement.

The court finds that there is no inference of age discrimination to be drawn from the company's use of the terms chemical operator and hourly production jobs, and no reasonable trier of fact could find that the company has been mendacious in its use of the two terms. Further, it appears that the plaintiffs' claim that the term chemical operator was not used until after the EEOC complaints were filed is incorrect.

b. Age Limitations for Skilled Trades Apprentices

The plaintiffs next contend that the company's use of age limitations for its skilled trades training program somehow demonstrates the company's age animus. The evidence before the court is that, prior to 1996, the Department of Labor had a regulation that allowed companies such as Rohm and Haas to bargain for and add age limitations to their skilled trades training programs. The age limitations were made a part of

the collective bargaining agreement. The age limitations were allowed because of the time and money the company invested in an apprentice for a skilled trade such as electrician/electronic instrument mechanic, carpenter/painter/insulator, maintenance mechanic, millwright/machinist/rigger, or pipefitter/welder. For example, it cost Rohm and Haas $26,376 to send an employee through the two-year millwright program. So that the companies could recoup some of these costs before the employee was eligible for retirement, companies were allowed to restrict the ages of persons hired for the apprentice programs. It should be noted that the age limitations for Rohm and Haas' apprentice programs were all over the age of forty. Furthermore, these age limitations applied only to the apprentice program for the skilled trades; they did not apply to the chemical operator jobs at issue here.

In 1996, the Department of Labor rescinded its exemption, and it is undisputed that Rohm and Haas immediately discontinued using the age limitations. The clause setting out the age limitations remained in the collective bargaining agreement in the event the Department of Labor allows the limitations some time in the future, but the age limitations for apprentices in the skilled trades are not in effect today.

The court finds that there is no material issue of fact concerning this issue. The fact that Rohm and Haas bargained for and obtained age limitations for its skilled trades jobs with Department of Labor approval is unrelated to any alleged age discrimination in its hiring for chemical operators.

c. Timing of the Adoption of the Hiring Criteria

The plaintiffs also contend that the timing of the adoption of the hiring criteria make the criteria suspect and raise a material of issue of fact. First, they complain that some of them were rejected for jobs in the chemical operation before the criteria were even adopted. This statement is true as far as it goes, but it is misleading. Prior to the adoption of the hiring criteria, the only persons considered for chemical operator positions were those persons with recall or rehire rights, or the employees who had transferred to other Rohm and Haas plants when they were laid off in 1987. The hiring criteria were formally adopted in November 1993, but Rohm and Haas did not begin to accept applications for "new hires" until May 1994. Any person inquiring about positions prior to this time was told that the company had no openings for "someone with your experience and educational background." The plaintiffs, like the plaintiffs in *Browning,* were in no better position than any other applicants because all of their recall/rehire rights had expired, and they had no preferential rights to employment by virtue of their former employment with Rohm and Haas. Thus, any person "off-the-street," including the plaintiffs, who inquired or applied for employment before May 1994, would have been rejected. The hiring criteria were firmly in place when the company began to accept applications for new employees.

Second, the plaintiffs claim that the adoption of the three criteria are suspect. They submit that the amount of discussion and time it took to develop and approve the Pellissippi State program as well as the emphasis placed on the development of the program is telling. It appears that what the plaintiffs are asking the court to do is assume that because many of the

enrollees in the Pellissippi State program might be younger than the plaintiffs, the time and effort Rohm and Haas put into developing the Pellissippi State program demonstrates age animus. Frankly, this argument stretches credulity. The fact that a local community college was willing to tailor a two-year program to Rohm and Haas' chemical operator hiring needs and that the graduates of this program might then qualify under the hiring criteria has no bearing on whether the hiring criteria were adopted to eliminate older workers from the company's workforce. In any event, there is absolutely no reason to believe that if any one of the plaintiffs had applied for and graduated from the Pellissippi State program they would have been rejected because of their age.

d. Statistical Evidence

The Sixth Circuit affirmed this court's rejection of the plaintiffs' statistical evidence in *Browning* because those statistics were not appropriately tailored to address the relevant labor pool and, in any event they did not support the plaintiffs' claims. In their response to the defendant's motion for summary judgment, the plaintiffs say that: "A statistical analysis is not necessary in this case because the significance of the numbers is stark." Doc. 53, at 64. First, the plaintiffs rely on the fact that more new hires were hired under the Pellissippi State program criterion before the lawsuit was filed in December 1996 than after the lawsuit was filed. This, the plaintiffs argue, shows the company's preference to hire from colleges. It seems that this is exactly what Rohm and Haas was trying to do when it adopted the hiring criteria. It was the opinion of the company's managers that college educated chemical operators were the kind of employees they wanted to hire. Two of the hiring criteria specifically address this

preference. The plaintiffs argue that this preference demonstrates the company's animus toward older workers because "the correlation between age and the 'degree' criteria is apparent." This so-called preference is purely in the minds of the plaintiffs, and is not evidence of age discrimination.

Next, the plaintiffs submit that the drop in the average age of the workforce is probative of the company's motive. The drop is easily explained and understood. Rohm and Haas had not hired any new employees since 1979. By 1993, many of these employees were getting ready to retire. This was the reason why Rohm and Haas began its hiring program -- the older workers would soon be leaving the company. In fact, 171 of the 200 or so bargaining unit employees elected to retire and were replaced with new hires.[7] It is to be expected, therefore, that the average age of the chemical operators would be dramatically less after 85% of the workers retired and were replaced with new workers.

As for the plaintiffs' new statistics, the court finds that they do not lead to an inference of age discrimination, either. First, comparing the ages of the plaintiffs who were not qualified for positions as chemical operators with the ages of persons who were qualified is a nonsensical comparison, at best. Such a comparison cannot lead to any conclusion about the company's motives. Second, even Dr. Schmidhammer recognizes that "relevant" experience could change his opinion about the age distribution and educational profile of the new hires compared to the general population.

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[7] This figure is based on the retirement rates from January 1993 to January 2001. The average age of the retirees was sixty-one years old.

The plaintiffs' "stark" numbers simply do no create any inference of age discrimination on the part of Rohm and Haas.

The court has reviewed the remainder of the plaintiffs' factual issues and finds that they were considered in *Browning* and rejected. For the reasons discussed above, the court finds that the additional facts upon which the plaintiffs rely do not change this courts conclusion that there is no genuine issue of material fact and summary judgment is appropriate.

2. Legal Issues

The plaintiffs argue that subsequent opinions of the Sixth Circuit and the Supreme Court compel a different legal analysis than this court and the Sixth Circuit used in *Browning,* citing to *Cline v. Catholic Diocese of Toledo,* 206 F.3d 651 (6th Cir. 2000) and *Reeves v. Sanderson Plumbing Company*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). In *Browning,* this court and the Sixth Circuit used a modified *McDonnell Douglas* burden-shifting scheme. The ultimate question, of course, is whether age was a determining or motivating factor in Rohm and Haas' decision not to consider the plaintiffs for chemical operator positions. *See, e.g., Hartsel v. Keys,* 87 F.3d 795, 800 (6th Cir. 1996). Proof of the employer's discriminatory motive is essential, but it can be inferred from differences in treatment. *Id.*

The plaintiffs argue that since this court's opinion in *Browning,* the Sixth Circuit has changed the way courts are to look at employment discrimination cases. The plaintiffs admit that the first step in the analysis is the requirement that the plaintiffs establish a prima facie case of age discrimination by showing that they are in the protected age group; that they

were not hired for a position that they are qualified for; and that the employer kept the position open looking for persons with the plaintiffs' qualifications. *See Cline,* 206 F.3d at 658. If the plaintiff is able to establish each of these elements, then a presumption of discrimination is created. *Id.* The burden of production then shifts to the employer to articulate a legitimate reason for refusing to hire the plaintiffs. *Id.* Once the defendant comes forward with its explanation, the presumption of discrimination disappears from the case, and the burden shifts to the plaintiffs to show that the employer intentionally discriminated against them, usually by showing that the employer's explanation is a pretext for discrimination. *Id.*

This is the analysis that the court and the Sixth Circuit used to analyze the plaintiffs' claims in *Browning.* The plaintiffs argue, however, that this court, like the district court in *Cline,* "conflated" the "qualified" element of the prima facie case and the pretext portion of the plaintiffs' burden of proof. In *Cline,* the plaintiff claimed that she had been discriminated against by her employer because of her pregnancy. The plaintiff had successfully worked for her employer for two years as an elementary teacher in the Diocese's Catholic school, but when it became obvious that she had gotten pregnant before she was married, the Diocese did not renew her contract for the following school year. *Cline,* at 656. The district court found that the Cline had not established her prima facie case because she could not show that she was qualified to be a teacher for the Diocese. She had violated her contract and one of the precepts of the Church by engaging in premarital sex. The district court also found that even if she had established her prima facie case, she did not show that the Diocese's non-discriminatory reason for firing

her (she violated her contract and one of the precepts of the Church) was a pretext for pregnancy discrimination. *Id.* at 659.

The Sixth Circuit held that the district court improperly rejected Cline's prima facie case, and it "conflated" the distinct stages of the burden-shifting analysis when it used the Diocese's non-discriminatory reason as the basis for finding that she was not qualified. *Id.* at 660. The Sixth Circuit pointed out that a plaintiffs burden at the initial, prima facie stage is not onerous, and all a plaintiff needed to show was that she was meeting her employer's legitimate expectations. *Id.* at 660-61. By using the employer's non-discriminatory reason as the benchmark for whether Cline was qualified the district court distorted the burden-shifting framework. *Id.* at 665.

The plaintiffs in the cases before this court argue that this court committed the same error in *Browning;* that is, the court conflated the plaintiffs' prima facie case with Rohm and Haas' non-discriminatory reason for not hiring them. The plaintiffs argue that: "This analysis improperly accepts that the hiring criteria are a nondiscriminatory indicator of who is qualified." Doc. 53, at 45-46. Thus, the plaintiffs would have this court agree that the plaintiffs were qualified for chemical operator positions with Rohm and Haas because they say they are.

Such a result would render the plaintiffs' burden of proof at the prima facie stage insignificant. Obviously, in a termination case such as *Cline,* the plaintiff had been working and presumably was meeting her employer's legitimate expectations until she was terminated. Thus, using the employer's reason for terminating her as a basis for finding

she was not qualified was improper. In a failure-to-hire case like the cases pending before this court, however, the plaintiffs still have to show that they meet their employer's legitimate expectations in order to establish their prima facie requirements. Rohm and Haas' legitimate expectation of its new hires was that they would meet one or more of the hiring criteria, and the plaintiffs did not meet this expectation. Thus, they were not qualified and they did not establish this element of their prima facie case.

This court then looked at the hiring criteria in light of the plaintiffs' arguments that they were adopted and implemented as a pretext for age discrimination. Considering all of the plaintiffs' arguments on this issue, the court found that there was no genuine issue of material fact that the hiring criteria were adopted for permissible reasons; that is, they are related to a chemical operator's job performance, and they promote the proficient operation of the business. This court and the Sixth Circuit refused to second-guess Rohm and Haas' decision to hire employees with better qualifications. *See Hartsell*, 87 F.3d at 801 (law does not require employers to make perfect decisions, or forbid them from making decisions with which others may disagree).

The court finds that *Cline* does not change this court's analysis of the parties' burdens in an age discrimination case, and the analysis used in *Browning* applies to the plaintiffs in these cases, as well.

The plaintiffs also suggest that *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) alters the court's legal analysis in *Browning*. In *Reeves*, the issue was whether a plaintiff's prima

facie case plus sufficient evidence to reject the employer's excuse is adequate to sustain the employer's liability. The Supreme Court held that it was, in agreement with *Kline v. TVA*, 128 F.3d 337 (6th Cir. 1997). *Reeves*, 530 U.S. at 148, 120 S.Ct. at 2109. But, where there is no genuine issue of material fact about the plaintiffs' prima facie case or the legitimacy of the employer's explanation for not hiring the plaintiff, summary judgment is appropriate. Thus, the court finds that *Reeves* makes no difference to this court's analysis of the defendant's motion for summary judgment.

III. CONCLUSION

In these cases, as well as *Browning*, the plaintiffs believed that they should have had preferential hiring rights in 1994 when Rohmand Haas began hiring for its chemical operation. Their belief was based entirely on their years of experience in another division, the plexiglas operation, which they left in 1982. What the record shows, however, is that from 1982 when the plaintiffs were laid off to 1994 when Rohm and Haas began to hire new employees, the company decided that a more sophisticated employee was needed in the chemical operation. Hiring criteria were developed which reflected the company's interest in this new type of employee, and all persons hired met one or more of the criteria. The plaintiffs' plexiglas experience was not relevant chemical plant experience given the kinds of jobs the plaintiffs did in the plexiglas operation.

The plaintiffs have not met their burden of coming forward with persuasive evidence of a genuine factual issue as to whether age was the motivating factor in the company's adoption of the hiring criteria. The court specifically adopts

the opinions of this court and the Sixth Circuit in *Browning,* and based on the reasoning of those opinions, the defendant's motion for summary judgment will be granted.

ENTER:

/s/ _____
Leon Jordan
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No: 3:97-cv-34
3:97-cv-341
3:97-cv-562

[Filed September 7, 2001]

ROBERT E. STOOKSBURY, et al.,	)
Plaintiffs,	)
v.	)
ROHM & HAAS TENNESSEE, INC.,	)
Defendant.	)
	)

ORDER

For the reasons stated in the Memorandum Opinion filed contemporaneously with this Order, it is hereby **ORDERED** that the motion of the defendant Rohm and Haas Company for summary judgment [doc. 35] is **GRANTED**, and these consolidated civil actions are **DISMISSED**.

ENTER:

/s/ _____
Leon Jordan
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No: 3:97-cv-34, 3:97-cv-341,
and 3:97-cv-562

[Filed April 4, 2001]

ROBERT E. STOOKSBURY, et al.,	)
Plaintiffs,	)
v.	)
ROHM & HAAS TENNESSEE, INC.,	)
Defendant.	)
	)

DRAFT PRETRIAL ORDER

The parties, through counsel, file this pretrial order pursuant to this Court's revised Scheduling Order in this case set for trial may 14, 2001.

(a) Jurisdiction:

Subject matter jurisdiction in this Court is based upon the plaintiffs' claims arising under the Age Discrimination in Employment Act of 1967 as amended, 29 U.S.C. §626(c), and the general jurisdiction of 28 U.S.C. § 1331 for federal questions arising under the Constitution, laws, or treaties of the United States, Jurisdiction is not in dispute.

(B) Pleadings:

The pleadings are amended to conform to this Pretrial Order.

(c) Summary of Plaintiffs' Theory:

(Working on this)

(d) Summary of Defendants' Theory:

(e) Issues to Be Submitted to the Trial Judge or Jury:

Issues Submitted to the Trial Judge

1. Legal issues have been submitted to the trial judge through the defendants' motion for summary judgment.

2. If the defendant is found liable for age discrimination, should the plaintiffs be awarded job positions with the defendant or, in the alternative, should the plaintiffs be awarded front pay.

3. If the defendant is found liable for age discrimination, what is the appropriate amount of prejudgment interest to which the plaintiffs are entitled.

Issues to be Submitted to the Jury

Using pattern or practice method:[1]

1. Was it the defendant's standard operating procedure or regular practice to exclude from rehire based on age its former employees who were laid off from the defendant's plexiglas department tn 1982?

2. If yes, did the defendant prove that any individual plaintiff was denied employment for a lawful reason? If yes, list which plaintiffs were denied employment for a lawful reason.

3. If the defendant engaged in age discrimination, what damages are the plaintiffs entitled to recover?

(a) The amount of backpay to which each plaintiff is entitled.

(b) The amount of front pay to which each plaintiff is entitled.

(c) The amount of compensatory damages to which each plaintiff is entitled.

4. If the defendant engaged in age discrimination, was the violation willful in that the defendant knew or showed

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[1] Alternative issue if pattern and practice method not used: Did the defendant discriminate against the plaintiffs based on age when it did not rehire them for hourly production jobs at its Knoxville plant?

reckless disregard for whether its conduct violated the ADEA?

(f) Stipulations of Fact:

Suggested topics for stipulations:

- ages/birthdates of plaintiffs
- ages/birthdates of "new hires"
- the number of employees recalled, rehired, and hired
- the relevant jobs and other facts as documented in the CBA
- the hiring procedure
- Information on the plaintiffs' "New Hire Employment History Index" or Charlie Clark's summary;
- plaintiffs' employment history with Rohm and Haas

(g) Novel or Unusual Questions of Law or Evidence:

There are no novel or unusual questions of law or evidence in this case.

(h) Estimated Length of Trial:

The parties estimate the length of trial to be approximately five (5) days.

(i) Settlement:

The possibility of settlement is unlikely at this time; however, if this Court does not grant the defendant's motion for summary judgment then the parties will consider whether this is an appropriate case for mediation.

(j). Miscellaneous Matters:

The parties know of no miscellaneous matters at this time that may contribute to the just, speedy and inexpensive determination of this case.

ENTER:

LEON JORDAN
U.S. DISTRICT COURT JUDGE

APPROVED FOR ENTRY:

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Attorneys for Defendant

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing Pretrial Order has been hand-delivered to E. H. Rayson and John Rayson at KRAMER, RAYSON, LEAKE, RODGERS & MORGAN, P.O. Box 629, Knoxville, Tennessee, 37901-0629 on this 4th day of April, 2001.

/s/ _____
JENNIFER B. MORTON

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No: 3:97-cv-34, 3:97-cv-341,
3:97-cv-562
[Filed April 16, 2001]

ROBERT E. STOOKSBURY, et al.,)
Plaintiffs,)
v.)
ROHM & HAAS TENNESSEE, INC.,)
Defendant.)
)

ORDER

These civil actions came before the court for a status conference on April 12, 2001. At that time, the parties requested that the court continue the trial of these cases. The court finds the request well-taken, and it is hereby **ORDERED** that the trial of these civil actions is **CONTINUED** to January 28, 2002, at 9:00a.m. All the deadlines in the court's previously entered Scheduling Order shall apply to this new trial date.

ENTER:

/s/ _____
Leon Jordan
United States District Judge

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

August 18, 2003

ROBERT E. STOOKSBURY, et al., Plaintiffs-Appellants,	)	
v.	)	NO. 01-6273
ROHM & HAAS TENNESSEE, INC., Defendant-Appellee.	)	

Transcript of Oral Argument

SPEAKER: I'm going to speak to the District Judge. In all candor, it may be highly peculiar, but it seems to me -- I don't know, obviously, what efforts you have made to settle this case. But it seems to me that when you get right down to it, there may be -- I don't know what the damages would be or whatever, but I would urge you to give it a very strong try before -- I speak very candidly myself. I don't know where to go with this case. And that's not a good situation for a Judge to be in, in the position that I am. And when you suggest that, you know, this is brand new territory in this circuit. That means, whether you agree or disagree with the 10th Circuit Case, somebody is probably going to file for certiary. Who knows how much longer this is going to go on.

SPEAKER: Speaking on behalf of Judge Jordan, this is a tough case.

SPEAKER: Oh, sure. To the extent that you do have an interest in pursuing further settlement discussions, we, of course, have an office of the -- conference (phonetically) attorney, I think he is called -- or they are called, and they engage in the settlement mediation process, and we are not involved at all in that process. Often not even aware of it. So that's up to you, obviously. There are some difficult issues, as Judge Carr indicated, but that's also what we are here to decide.

So the case is under advisement at this point. We do appreciate your arguments, and the clerk may call the next case.

(End of Recording.)

CERTIFICATE

STATE OF TENNESSEE

COUNTY OF KNOX

I, Kenneth R. Gibson, Certified Shorthand Reporter and Notary Public, do hereby certify that I reported in machine shorthand the above proceedings; that the foregoing pages were transcribed under my personal supervision and constitute a true and accurate record of the proceedings.

I further certify that I am not an attorney or counsel of any of the parties, nor an employee or relative of any attorney or counsel connected with the action, nor financially interested in the action.

Witness my hand and seal this the 18th day of August, 2003.

/s/_____

Kenneth R. Gibson
Certified Shorthand Reporter
and Notary Public
My Commission Expires:
August 5, 2003